Khairuddin bin Abu Hassan lwn Kerajaan Malaysia dan satu lagi

MAHKAMAH TINGGI (KUALA LUMPUR) — SAMAN PEMULA NO 44–68–05 TAHUN 2016
AZMAN ABDULLAH H
17 JUN 2016

Undang-Undang Perlembagaan — Undang-undang — Keperlembagaan — Mahkamah jenayah memutuskan pertuduhan ke atas pemohon di bawah s 124L Kanun Keseksaan tidak tergolong sebagai pertuduhan di bawah Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 — Pendakwa Raya merayu terhadap keputusan berdasarkan s 50(3) Akta Mahkamah Kehakiman 1964 ('Akta') — Sama ada pendakwa raya tidak patuh kepada s 50(2) dan (2A) apabila bergantung kepada s 50(3) Akta — Sama ada s 50(3) Akta bercanggah dengan perkara 8 Perlembagaan Persekutuan — Akta Mahkamah Kehakiman 1964 s 50(2), (2A) & (3) — Perlembagaan Persekutuan perkara 8

Pemohon telah dituduh atas kesalahan percubaan melakukan sabotaj di bawah s 124L Kanun Keseksaan ('Kanun'). Berdasarkan usul jenayah yang telah difailkan oleh pemohon, hakim Mahkamah Tinggi jenayah telah memutuskan bahawa pertuduhan ke atas pemohon tidak tergolong sebagai pertuduhan di bawah peruntukan Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012. Pendakwa raya ('responden kedua') kemudiannya telah merayu ke atas keputusan tersebut dan dalam masa yang sama pemohon telah memfailkan tindakan ini dan mendakwa bahawa responden kedua telah melakukan ketidakpatuhan kepada s 50(2) dan (2A) Akta Mahkamah Kehakiman 1964 ('Akta') kerana bergantung kepada s 50(3) Akta dalam memfailkan rayuan. Pemohon menyatakan bahawa s 50(3) Akta meletakkan responden kedua dalam tahap lebih beruntung daripada pemohon dalam proses pembawaan rayuan jenayah, oleh itu, ianya telah mencabuli peruntukan perkara 8 Perlembagaan Persekutuan ('Perlembagaan'). Isu yang perlu ditentukan adalah sama ada s 50(2) dan (3) Akta berlawanan dengan perkara 8(1) Perlembagaan.

Diputuskan, menolak permohonan pemohon:

(1) Tidak mungkin dalam semua keadaan undang-undang yang dikuatkuasakan adalah sama rata kepada semua orang. Adalah tidak benar ianya mencabuli perkara 8(1) Perlembagaan. Berdasarkan prinsip 'intelligible differentia', maksud hak yang dikatakan terpilih-pilih dan tidak sama rata di bawah perkara 145(3) Perlembagaan tidak boleh dikatakan berlawanan dengan perkara 8 Perlembagaan begitu juga s 50(3) Akta (lihat perenggan 35, 37 & 48).

(2) Peruntukan s 50(2) Akta menyatakan keputusan Mahkamah Tinggi melaksanakan atas kuasa rayuan sahaja yang perlukan kebenaran untuk merayu daripada Mahkamah Rayuan Malaysia. Dalam kes ini, bidang kuasa mahkamah majistret hanya menyebut kes ini sementara menunggu izin dari pihak peguam negara untuk dipindah bagi tujuan perbicaraan di Mahkamah Tinggi. Oleh itu, kebenaran untuk merayu atas keputusan hakim bicara di Mahkamah Tinggi ke Mahkamah Rayuan tidak timbul langsung (lihat perenggan 39–40 & 45).

[English summary

The applicant was accused for an attempt to sabotage under s 124L Penal Code ('the Code'). Based on the criminal motion filed by the applicant, the High Court judge ruled that a criminal charge on the applicant was not classified as a charge under the provisions of the Security Offences (Special Measures) Act 2012. The public prosecutor ('the second respondent') subsequently appealed against the decision and at the same time, the applicant filed the present action claiming that the second respondent had breached s 50(2) and (2A) of the Courts of Judicature Act 1964 ('the Act') for placing reliance on s 50(3) of the Act in filing the appeal. The applicant stated that s 50(3) of the Act placed the respondents at a better stage than the applicant in the process of adducing the criminal appeal, therefore, it violated the provisions of art 8 of the Federal Constitution ('the Constitution'). The issue for determination was whether s 50(2) and (3) of the Act was in contrary to art 8(1) of the Constitution.

Held, dismissing the applicant's application:

(1) It is not possible in all circumstances that the law is enforced equally to everyone. It is not true that it violated art 8(1) of the Constitution. Based on the principle of 'intelligible differentia', the purpose of which is said to be selected and unequal under art 145(3) of the Constitution cannot be said to be contrary to art 8 of the Constitution as well as s 50(3) of the Act (see paras 35, 37 & 48).

(2) The provisions of s 50(2) of the Act states that only the decision of the High Court in exercise of its appellate jurisdiction would required the permission to appeal from the Court of Appeal. In this case, the jurisdiction of the magistrate's court only mentioned this case was pending leave by the attorney general to be transferred for trial in the High Court. Therefore, leave to appeal against the decision of the trial judge in the High Court to the Court of Appeal did not arise at all (see paras 39–40 & 45).]

Nota-nota

Untuk kes-kes mengenai keperlembagaan, lihat 3(2) *Mallal's Digest* (5th Ed, 2015) perenggan 2980–2983.

Kes-kes yang dirujuk

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, MP (dirujuk)
Charanjit Lal Chowdbury v Union of India and others 1951 AIR 41, MA (dirujuk)
Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener) [2010] 2 MLJ 285, MP (dirujuk)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, MP (dirujuk)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, MP (dirujuk)
Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal [2016] 2 MLJ 309, MP (dirujuk)
Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165; [1986] 1 MLRA 272, MA (dirujuk)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (dirujuk)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, MP (dirujuk)
PP v Azmi bin Sharom [2015] 6 MLJ 751; [2015] 8 CLJ 921, MP (dirujuk)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (dirujuk)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, MP (dirujuk)
PP v Mahathir bin Muhammad [2013] 1 MLJ 50, MR (dirujuk)
PP v Pasupathy s/o Kanagasaby [2001] 2 MLJ 143, MR (dirujuk)
PP v Pung Chen Choon [1994] 1 MLJ 566, MA (dirujuk)
PP v Su Liang Yu [1976] 2 MLJ 128 (dirujuk)
PP v Yuneswaran a/l Ramaraj [2015] 6 MLJ 47, MR (dirujuk)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, MR (dirujuk)
The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, In re 1939 AIR FC 1 (dirujuk)
The State of West Bengal vs Anwar All Sarkarhabib 1952 AIR 75, MA (dirujuk)
Yii Hung Siong v PP [2005] 6 MLJ 432, MT (dirujuk)

Undang-undang yang dirujuk

Akta Dadah Berbahaya 1952 s 41A
Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ss 3, 12
Akta Mahkamah Kehakiman 1964 ss 30, 35, 39B, 48, 50(2), (2A), 50(3), Jadual Pertama
Kanun Keseksaan ss 3, 121, 121A, 121B, 121C, 121D, 122, 123, 124, 124A, 124B, 124C, 124D, 124E, 124F, 124G, 124H, 124I, 124J, 124K, 124L, 124M, 124N, 125, 125A, 126, 127, 128, 129, 130, 130A, 130B, 130C, 130D, 130E, 130F, 130FA, 130FB, 130G, 130H, 130I, 130J, 130JA, 130JB, 130JC, 130JD, 130K, 130KA, 130L, 130M, 130N, 130O, 130P, 130Q, 130R, 130S, 130T, 130TA, 130U, 130V, 130W, 130X, 130Y, 130Z, 130ZA, 130ZB, 130ZC, Jadual Pertama, Bab VI, VIA, VIB
Kanun Tatacara Jenayah s 323
Perlembagaan Persekutuan perkara 5, 8, 8(1), 145(3), (4)

Hanif Katri (Muhammad Rafique dan Mohd Akmal Afiq bersamanya) (Law Practice of Rafique) bagi pihak pemohon.
Mohamad Abazafree bin Mohd Abbas (Awang Amadajaya bin Awang Mahmud, Mohd Zain Ibrahim dan Adam Mohamed bersamanya) (Timbalan Pendakwa Raya, Jabatan Peguam Negara) bagi pihak responden.

Azman Abdullah H:

LATAR BELAKANG KES

[1] Permohonan pemohon adalah untuk perintah-perintah berikut:

(a) s 50(3) Akta Mahkamah Kehakiman 1964 adalah diisytiharkan tidak sah dan terbatal atas alasan ultra vires dengan perkara 8 Perlembagaan Persekutuan.

Dengan itu:

(b) notis rayuan defendan kedua (pendakwa raya) bertarikh 18 November 2015 bagi Mahkamah Rayuan Rayuan Jenayah No W-09–320–11 Tahun 2015 adalah diisytiharkan sebagai tidak sah dan adalah terbatal; dan

(c) rayuan defendan kedua (pendakwa raya) melalui Mahkamah Rayuan Malaysia Rayuan Jenayah No W-09–320–11 Tahun 2015 adalah dibatalkan.

[2] Permohon ada memfailkan afidavit sokongan bersama-sama dan defendan-defendan ada memfailkan afidavit balasan.

[3] Mahkamah pada 17 Jun 2016 telah menolak permohonan pemohon apabila memutuskan bahawa s 50(3) Akta Mahkamah Kehakiman 1964 adalah sah tidak 'ultra vires' dan/atau bercanggah dengan perkara 8 Perlembagaan Persekutuan dan notis rayuan responden kedua (pendakwa raya) bertarikh 18 November 2015 ke Mahkamah Rayuan Malaysia Rayuan Jenayah No W-09–320–11 Tahun 2015 masih lagi sah dan tidak terbatal.

[4] Pemohon tidak berpuas hati dan merayu ke Mahkamah Rayuan atas keputusan Mahkamah Tinggi ini.

KRONOLOGI KES

[5] Pada 12 Oktober 2015 pemohon dan Mathias Chang telah dibawa ke Mahkamah Majistret 7 Kuala Lumpur di bawah s 124L Kanun Keseksaan atas pertuduhan percubaan melakukan sabotaj. Kertas pertuduhan di ekshibit sebagai K1.

[6] Pada tarikh yang sama tanpa menjejaskan hak pemohon dan Mathias Chang untuk mencabar kesahihan pertuduhan di sisi perlembagaan, peguam keduanya telah membangkitkan isu perundangan terhadap pertuduhan yang dibacakan seperti berikut:

(a) pertuduhan di bawah s 124L Kanun Keseksaan ('KK') tidak boleh tergolong sebagai kesalahan-kesalahan yang boleh dijadualkan di bawah peruntukan-peruntukan prosedur Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 (SOSMA) ('Akta 747');

(b) kertas pertuduhan yang dibacakan terhadap peruntukan Akta 747. Justeru, bidang kuasa mendengar pertuduhan dan/atau perbicaraan di bawah s 124L semestinyalah berada di dalam bidang kuasa Mahkamah Sesyen Kuala Lumpur; dan/atau

(c) pemohon dan Mathias Chang adalah berhak untuk dijamin dan/atau dilepaskan atas jaminan sementara menunggu pelupusan perbicaraan.

[7] Pada 26 Oktober 2015 Puan Majistret setelah mendengar hujahan kedua-dua pihak, pihak majistret telah membenarkan kes ini dipanggil semula iaitu dihujung tempoh dua minggu selepas tarikh prosiding untuk pihak pendakwaan menyelesaikan isu sanksi bagi tujuan pindahan pertuduhan untuk perbicaraan di Mahkamah Tinggi Kuala Lumpur.

[8] Pada 12 Oktober 2015 peguamcara pemohon telah memohon secara bertulis kepada timbalan pendaftar, Mahkamah Tinggi Jenayah Kuala Lumpur untuk semakan keputusan puan majistret (surat bertarikh eksh K2).

[9] Permohonan ini telah dibawa kepada perhatian Hakim Dato' Mohd Azman Hussin, Mahkamah Tinggi Jenayah 1 dan saya telah memberi arahan kepada peguamcara pemohon untuk menfailkan satu notis permohonan untuk menampilkan persoalan berhubung dengan isu 'sama ada pertuduhan yang ditampilkan terhadap perayu-perayu adalah tergolong sebagai pertuduhan untuk dibicarakan di bawah Akta 747'. Surat jawapan Mahkamah Tinggi Kuala Lumpur bertarikh 12 Oktober 2015 (eksh K3) menyatakan bahawa YA Hakim tidak berhasrat untuk mendengar permohonan semakan di bawah s 323 Kanun Tatacara Jenayah. YA Hakim telah arahkan peguamcara menfailkan notis permohonan dan afidavit sokongan.

[10] Pada 13 Oktober 2015 satu notis usul jenayah No MT(J)(1)44–103–10 Tahun 2015 (eksh K4) telah difailkan oleh peguamcara pemohon selaras dengan s 35 Akta Mahkamah Kehakiman 1964 ('Akta 91') dan pemakaian kuasa seliaan dan/atau bidang kuasa sedia ada Mahkamah Tinggi Jenayah untuk perintah-perintah berikut:

(a) pertuduhan di bawah s 124L KK yang ditampilkan terhadap pemohon dan Matthias Chang adalah tidak tergolong sebagai pertuduhan untuk dibicarakan di bawah peruntukan prosedur Akta 747;

(b) pemohon dan Matthias Chang dilepaskan di bawah jaminan yang berpatutan; dan

(c) lain-lain perintah yang dianggap adil dan suaimanfaat oleh mahkamah ini.

[11] Pada 18 November 2015 notis usul jenayah tersebut telah diputuskan oleh Hakim Dato' Mohd Azman Hussin bahawa pertuduhan terhadap pemohon dan Mathias Chang tidak tergolong sebagai pertuduhan di bawah peruntukan Akta 747 dan selanjutnya pemohon dan Matthais Chang telah dilepaskan dengan jaminan sebanyak RM10,000 dengan seorang penjamin setiap satu sehingga selesai pertuduhan terhadap mereka.

[12] Pada 18 November 2015 defendan kedua ('D2') kemudiannya telah memfailkan notis rayuan (eksh K6) untuk merayu terhadap keputusan saya.

[13] Pada 24 Februari 2016, peguamcara plaintif dan Mathias Chang telah memfailkan satu notis usul jenayah (eksh K8) di Mahkamah Rayuan untuk perintah-perintah seperti berikut:

(a) bahawa s 50(3) Akta 91 adalah 'ultra vires' kepada perkara 8 Perlembagaan Persekutuan dan justeru itu adalah terbatal dan tidak sah *ab initio*;

(b) notis rayuan pendakwa raya ('PP') bertarikh 18 November 2015 adalah tidak sah dan terbatal kerana bercanggah dengan s 50(2) dan (2A) Akta 91; dan

(c) rekod rayuan PP bertarikh 11 Januari 2016 dan petisyen rayuan PP bertarikh 19 Januari 2016 adalah juga dibatalkan dengan mengakibatkan keseluruhan rayuan D2 ditolak dan/atau dibatalkan.

[14] PP telah memfailkan satu bantahan awal mengenai notis usul jenayah ini.

[15] Pada 20 April 2016, Mahkamah Rayuan telah membenarkan bantahan awal tersebut manakala notis usul jenayah pemohon dan Matthias Chang telah ditolak. Pada masa yang sama, Mahkamah Rayuan telah membenarkan permohonan pemohon dan Matthias Chang untuk penggantungan prosiding notis rayuan PP bertarikh 18 November 2015.

[16] Mahkamah Rayuan juga telah menasihatkan peguamcara pemohon

dan Matthias Chang bahawa pemohon berhak untuk memfailkan satu permohonan di Mahkamah Tinggi KL untuk tujuan mendapatkan satu deklarasi bahawa s 50(3) Akta 91 adalah bertentangan dengan perkara 8 Perlembagaan Persekutuan.

ALASAN-ALASAN KEPADA PERMOHONAN PEMOHON

[17] Pendakwa raya ('PP') telah melakukan ketidakpatuhan kepada s 50(2) dan (2A) Akta 91 kerana bergantung salah kepada s 50(3) Akta 91. Seksyen 50(3) Akta 91 meletakkan PP dalam tahap lebih keberuntungan dari plaintif dalam proses pembawaan rayuan jenayah.

[18] Sekiranya pemohon telah gagal di Mahkamah Tinggi tempoh hari, pemohon perlu memfailkan kebenaran merayu selaras dengan s 50(2) dan (2A) Akta 91.

[19] Keberuntungan dan keutamaan yang diberikan kepada pihak PP jika dibandingkan dengan pemohon dalam perkara rayuan jenayah itu adalah mencabuli peruntukan perkara 8 Perlembagaan Persekutuan.

[20] Pemohon berhak mencabar kesahihan s 50(3) Akta 91 di sisi perkara 8 Perlembagaan Persekutuan.

[21] Pemohon akan diprejudiskan jika saman pemula ini tidak dibicarakan sebelum pendengaran Rayuan Jenayah No W-09–320–11 Tahun 2015 kerana ia akan menjadikan saman pemula ini sia-sia.

[22] Relif-relif yang dipohon:

(a) bahawa s 50(3) Akta 91 adalah diisytiharkan sebagai tidak sah dan terbatal disebabkan ultra vires dan/atau bercanggah dengan perkara 8 Perlembagaan Persekutuan;

(b) lanjutan daripada kandungan perenggan 1 di atas:

(i) notis rayuan D2 bertarikh 18 November 2015 bagi Mahkamah Rayuan Rayuan Jenayah No W-09–320–11 Tahun 2015 adalah diisytiharkan sebagai tidak sah dan adalah terbatal; dan

(ii) rayuan D2 melalui Mahkamah Rayuan Malaysia, Rayuan Jenayah No W-09–320–11 Tahun 2015 adalah dibatalkan;

(c) lain-lain perintah lanjutan yang difikirkan suaimanfaat dan/atau perlu oleh mahkamah ini; dan

(d) tiada perintah untuk kos.

HUJAHAN PEMOHON

[23] Peguam pemohon menghujahkan bahawa Mahkamah Tinggi ini tidak mempunyai kuasa di bawah perkara 4(1) Perlembagaan Persekutuan untuk menentukan persoalan yang dipohon dan diajukan di dalam permohonan ini dan telah dirujuk kes *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 di ms 113:

> Under our Constitution written law may be invalid on one of these grounds:
>
> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or
>
> (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or
>
> (3) in the case of State written law, because it is inconsistent with Federal law, article 75.
>
> The court has power to declare any Federal or State law invalid on any of the above three grounds.
>
> *4 Supreme law of the Federation*
>
> (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.
>
> (2) The validity of any law shall not be questioned on the ground that —
>
> (a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or
>
> (b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.
>
> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
>
> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within

paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

50 Jurisdiction to hear and determine criminal appeals

of fact or a question of law or on a question of mixed fact and law. (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —

(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

(2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

(2A) An application for leave under subsection (2) shall be made within fourteen days after the date of the decision of the High Court.

(3) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any other officer authorized by the Public Prosecutor; and notwithstanding subsection (2) *no leave of the Court of Appeal is required.*

(4) Except as otherwise provided in this section, an appeal may lie on a question.

[24] Secara pilihannya dihujahkan jika sekalipun Mahkamah Tinggi ini berpendapat bahawa penentuan yang diutarakan ini melibatkan persoalan Perlembagaan yang mana sepatutnya dibawa di hadapan Mahkamah Persekutuan di bawah ss 30 dan 48 Akta Mahkamah Kehakiman 1964 dan kes *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166 di ms 167:

This a reference of a constitutional question by the High Court, Kuala Trengganu, under Section 48 of the Courts of Judicature Act No 7 of 1964, of which subsection (1) reads:

Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the judge hearing such proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

We are asked to rule on the validity of the Essential (Security Cases) Regulations, 1975 (published as PU (A) 320/75) as amended by the Essential(Security Cases) (Amendment) Regulations, 1975 (published as PU(A) 362/75). I shall refer to these regulations simply as the 1975 regulations.

[25] Peguambela pemohon menghujahkan bahawa mahkamah ini sama ada secara terus atau alternatif perlu merujuk ke Mahkamah Persekutuan persoalan ini kerana Mahkamah Tinggi ini tidak mempunyai kuasa untuk menentukan s 50(3) Akta Mahkamah Kehakiman 1964 adalah berperlembagaan.

HUJAHAN PIHAK RESPONDEN-RESPONDEN/PENDAKWA RAYA

[26] Pihak pendakwa raya menghujahkan bahawa Perlembagaan Persekutuan Malaysia tidak terikat dengan undang-undang negara lain untuk pemakaiannya bagi menentukan s 50(2) dan (3) berlawanan dengan perkara 8 Perlembagaan Persekutuan. Doktrin 'Supremacy of the constitution' digunapakai.

[27] Pihak responden menghujahkan bahawa tujuan permohonan ini oleh pemohon tidak lain dan tidak bukan bertujuan untuk membatalkan rayuan pihak pendakwa raya ke Mahkamah Rayuan Malaysia.

[28] Pihak responden telah merujuk kepada beberapa kes untuk menunjukan bahawa pihak yang hendak membuktikan sebaliknya bahawa seksyen berkaitan itu berlawanan dengan Perlembagaan dianggap memikul beban membuktikannya bukannya beban di pihak lawan (responden) antara kes-kes yang dirujuk ialah:

Public Prosecutor v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (MT), *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, *Yii Hung Siong v Public Prosecutor* [2005] 6 MLJ 432, *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 dengan merujuk kepada kes India di dalam kes *In re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act* 1939 AIR FC 1.

[29] Di dalam kes tempatan Mahkamah Rayuan Malaysia di dalam kes *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 dan kes *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921 (MP) di mana Tun Ariffin Zakaria CJ menyatakan sebagai berikut:

[31] The constitutionality of s 8A(1) of the Printing Presses and Publications Act 1984 came for consideration of the Supreme Court in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566. In that case the Supreme Court laid down some of the

tests to be applied in determining whether the impugned law is consistent with art 10(2)(a) of the Constitution. The court held, firstly, that there is a strong presumption of the constitutionality of the impugned law and the burden of proof lies on the party seeking to establish the contrary. And in deciding whether a particular piece of legislation falls within the orbit of permitted restrictions, consideration must be given to the question whether such law is directed at a class of acts too remote in the chain of relation to the subjects enumerated under art 10(2)(a). The test as propounded by the court is that the connection contemplated must be real and proximate, not far-fetched or problematical.

KEPUTUSAN MAHKAMAH INI DAN ALASANNYA

[30] Terlebih dahulu perlu dirujuk kepada dua keputusan yang berlainan di dalam isu sama ada s 50(2) ini berlawanan dengan perkara 8(1). Dua kes tersebut ialah *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143. Satu lagi di dalam kes *Public Prosecutor v Mahathir bin Muhammad* [2013] 1 MLJ 50.

[31] Di dalam kes *Pasupathy s/o Kanagasaby* (MR) dinyatakan sebagai:

Therefore, it is only reasonable to grant the public prosecutor, being the guardian of public and State's interests, the privilege to re-examine the whole case so far presented to the court before a higher tribunal, ie by way of an appeal.

[32] Manakala di dalam keputusan kes *Public Prosecutor v Mahathir bin Muhammad* diputuskan atas isu yang sama sebagai:

the interpretation as adopted by the Court of Appeal in *Pasupathy*, as rightly submitted by Encik Hisyam, learned counsel for the respondent, does not seem to be in harmony with the spirit of art 8 of the Federal Constitution that provides for equality before the law. If one were to accept the prosecution's contention, then, on the question of fact or on the question of mixed law and fact, the accused person is entitled to raise it only twice before the courts (that is, before the magistrate's court and before the High Court), whereas the public prosecutor, on the other hand, is entitled to raise it thrice before the courts (that is, before the magistrate's court, before the High Court and before the Court of Appeal). Such an interpretation, if adopted, would be discriminatory in nature: it discriminates unfairly against the accused person; particularly, bearing in mind that even as it is now the public prosecutor vis a vis the accused is already in an advantageous position in that he is exempted from the requirement to obtain leave in order to appeal to the Court of Appeal.

[33] Hujahan pihak pemohon kepada perkara 5 Perlembagaan Persekutuan sebagai semua orang sama rata di sisi undang-undang. Perkara 5(1):

All persons are equal before the law and entitled to equal protection of the law.

[34] Responden menghujahkan bahawa pihak peguamcara pemohon lupa untuk melihat pada peruntukan keistimewaan peguam negara di dalam perkara 145(3) hingga (4) bahawa dijelaskan akan kuasa-kuasa peguam negara adalah lebih diberi keistimewaan dari orang ramai yang lain:

> 145 Attorney General
>
> (1) The Yang di-Pertuan Agong shall, on the advice of the Prime Minister, appoint a person who is qualified to be a judge of the Federal Court to be the Attorney General for the Federation.
>
> (2) It shall be the duty of the Attorney General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law.
>
> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.
>
> (3a) Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred.
>
> (4) In the performance of his duties the Attorney General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in the Federation.

[35] Tidak mungkin dalam semua keadaan undang-undang yang dikuatkuasakan adalah sama rata kepada semua orang. Di dalam kes *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309 Mahkamah Persekutuan, telah merujuk kepada beberapa kes lain antaranya:

Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165; [1986] 1 MLRA 272. Di mana Salleh Abas LP di ms 279–280:

> The requirement for equal protection of the law does not mean that all laws passed by a Legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as, inter alia, age, ability, education, height, size, colour, wealth, occupation, race and religion. Any law made by a Legislature must of necessity involve the making of a choice and differences as regards its application in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatised as discriminatory and the impugned legislation is therefore

unconstitutional and invalid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause.

[36] Turut dirujuk kes *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 iaitu:

> The law on art 8 of the Federal Constitution is settled. A law that discriminates is good law if it is based on reasonable or permissible classification. The governing principles of law on art 8 of the Federal Constitution was succinctly laid down in the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 where His Lordship Suffian LP in referring to the Indian Supreme Court case of *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors* [1958] AIR 538, held that a law that discriminates is good law if it is based on reasonable or permissible classification. Two conditions must be satisfied, that is:
>
> i. The classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>
> ii. The differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

[37] Oleh itu, adalah tidak benar ianya mencabuli perkara 8(1). Mahkamah Persekutuan ada merujuk kepada kes *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 di mana diputuskan oleh Hashim Yeop A Sani J di ms 133:

> The settled law now is that for the test of permissible classification to be satisfied, two conditions must be fulfilled namely: (1) the classification must be founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (2) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

[38] Mahkamah Persekutuan di dalam kes *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285, telah merujuk kepada kes yang diputuskan oleh Raja Azlan Shah (Baginda Sultan pada masa itu) di dalam kes *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 memutuskan bahawa:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied and this wording 'can never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544. Each country frames its Constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences and from a desire to see how their progress and well being is ensured by their fundamental law.

Seksyen 12 Akta 747 memperuntukkan pertuduhan di bawah s 124L Kanun Keseksaan (*security offences*) dibicarakan di Mahkamah Tinggi, bukan di mahkamah majistret.

[39] Perlu diingatkan bahawa peruntukan s 50(2) menyatakan keputusan Mahkamah Tinggi melaksanakan atas kuasa rayuan sahaja yang perlukan kebenaran untuk merayu dari Mahkamah Rayuan Malaysia:

> S 50(2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court *in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court* but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

[40] Bidang kuasa mahkamah majistret hanya menyebut kes-kes ini sementara menunggu izin dari pihak peguam negara untuk dipindah bagi tujuan perbicaraan di Mahkamah Tinggi.

[41] Seksyen 12 Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 memperuntukan bahawa:

> 12 Trial of security offences.
>
> All security offences shall be tried by the High Court.

[42] Manakala s 3 Akta 747 yang sama memberi maksud 'security offences' adalah seperti mana yang tertakluk di dalam Jadual Pertama:

> 3 Interpretation
>
> In this Act, unless the context otherwise requires — 'security offences' means the offences specified in the First Schedule.

[43] Manakala 'First Schedule' adalah termasuk kesalahan di bawah s 124L ini di bawah Bab VI Kanun Keseksaan, yang mana Bab VI, VIA dan VIB Kanun Keseksaan dari s 121 hingga s 130ZC adalah di bawah Jadual Pertama (s 3) ini.

> First Schedule (Section 3)
>
> SECURITY OFFENCES
>
> Penal Code [Act 574]:
>
> (i) Offences under Chapter VI
>
> (ii) Offences under Chapter VIA
>
> (iii) Offences under Chapter VIB.

[44] Secara perbandingan, kesalahan di bawah pertuduhan di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB') di mana s 41A ADB menyatakan:

> 41A Special Provision relating to transmission of a case to and trial by, the High Court.
>
> (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case of the High Court without holding a preliminary inquiry under Chapter XV11 of the Criminal Procedure Code, and cause the person to appear or brought before such Court as soon as practicable.
>
> (2) When the accused person appears or brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
>
> (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.
>
> (4) The provision of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.

[45] Majistret berkenaan tidak mempunyai bidang kuasa pun untuk mencatatkan pangakuan sama ada tertuduh minta bicara atau mengaku salah. Hanya membaca pertuduhan tanpa mendapatkan pengakuan. Dengan itu kebenaran untuk merayu atas keputusan hakim bicara di Mahkamah Tinggi ke Mahkamah Rayuan tidak timbul langsung.

PERKARA 145(3) PERLEMBAGAAN PERSEKUTUAN MEMBERI KUASA HANYA KEPADA PEGUAM NEGARA TIDAK KEPADA PENGADU (MANGSA) MENERUS ATAU MENARIK BALIK PENDAKWAAN

[46] Jika pihak pemohon menghujahkan orang awam perlu diberikan sama rata dengan pendakwa raya maka sudah tentu orang awam (pengadu/mangsa) juga tidak diberi sama rata kuasa untuk menarik balik atau meneruskan dengan pendakwaan di dalam kes-kes jenayah rogol dan samun atau mendatangkan kecederaan.

[47] Perkara 145(3) Perlembagaan Persekutuan memperuntukkan:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings

before a Syariah court, a native court or a court-martial.

[48] Oleh itu, maksud hak yang dikatakan terpilih-pilih dan tidak sama rata di bawah perkara 145(3) tidak boleh dikatakan berlawanan dengan perkara 8 begitu juga s 50(3) Akta Mahkamah Kehakiman 1964. Oleh itu, prinsip 'intelligible differentia' yang diterima pakai oleh mahkamah di dalam kes-kes tempatan dan India seperti yang dirujuk di atas di dalam keputusan Mahkamah Persekutuan diputuskan baru-baru ini di dalam kes *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309 telah merujuk kepada kes-kes *Malaysian Bar & Anor* dan kes *Datuk Haji Harun Idris* [1977], *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 dan telah merujuk kes-kes India di dalam kes *Charanjit Lal Chowdbury v Union of India and others* 1951 AIR 41 dan kes *The State of West Bengal vs Anwar All Sarkarhabib* 1952 AIR 75.

> [45] The law on art 8 of the Federal Constitution is settled. A law that discriminates is good law if it is based on reasonable or permissible classification. The governing principles of law on Article 8 of the Federal Constitution was succinctly laid down in the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 where His Lordship Suffian LP in referring to the Indian Supreme Court case of *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors* [1958] AIR 538, held that a law that discriminates is good law if it is based on reasonable or permissible classification. Two conditions must be satisfied, that is:
>
> (a) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>
> (b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.
>
> [46] The doctrine of reasonable classification has been accepted and applied by our courts in the cases of *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166, *Abdul Ghani bin Ali Ahmad & Ors v Public Prosecutor* [2001] 3 MLJ 561; [2001] 3 CLJ 769, *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Interverner)* [2004] 2 MLJ 257, *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507. In fact in the very recent case of *Lembaga Minyak Sawit Malaysia v Arunamari Plantation Sdn Bhd & Ors and another appeal* [2015] 4 MLJ 701; [2015] 5 MLRA 1 this court in referring to the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 had this to say:
>
> > [43] It is given that art 8 of the Constitution guarantees that all persons are equal before the law and entitled for equal protection of the law. The jurisprudence

relating to art 8 of the Constitution has been aptly discussed and summarised in the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155. In that case one of the issues raised was that s 418 of the Criminal Procedure Code (under the provisions of which the case was transferred from the subordinate court to the High Court for trial) was inconsistent with art 8 of the Constitution and therefore void by virtue of art 4. Suffian LP, in dealing with this issue, had laid down the principles of equality in the Malaysian context in this way:

(1) The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.

(2) The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and art 153.

(3) The prohibition or unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the word 'public authority' in cl (4) and 'practice' in clause (5)(b) of art 8.

(4) The prohibition applies to both substantive and procedural law.

(5) Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para c)); residents in a particular State as opposed to residents elsewhere (para d)); and Malays and natives of Borneo as opposed to others who are not (art 153).

(6) ... the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the Constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and ifit is not, the law is void.

(7) ... discriminatory law is good law if it's based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced the judgment in *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors* [1958] AIR 538, provided that:

(i) The classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) The differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

(8) Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law ...

(9) In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

(10) Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause.

[44] The jurisprudence relating to art 8 of the Constitution was further propounded in the case of *Malaysian Bar & Anor v Government of Malaysia* [1986] 1 MLRA 272. There, Salleh Abas LP in his dissenting judgment stated as follows at pp 279–280:

> The requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as, inter alia, age, ability, education, height, size, colour, wealth, occupation, race and religion. Any law made by a legislature must of necessity involve the making of a choice and differences as regards its application in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatised as discriminatory and the impugned legislation is therefore unconstitutional and invalid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause. Its classic rendering is well summarised in *Lindley v National Carbonic Gas Co* [1911] 220 US 61, pp 76–79, 55 L Ed 369 [this case should be cited as *Lindley v Natural Carbonic Gas Co*], in the following terms:
>
> 1. The equal protection clause of the 14th amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called in question, it any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

[47] From the above cases, it is trite law that classification for the purpose of discrimination is permissible. However, the classification must have rational relation to the object sought to be achieved by the law in question for it to become a valid law. Whether a particular classification is rational or not, it is necessary to look at the object and intent of such laws and the Rules drafted there under.

[48] In the context of the present case, in order to appreciate the real intent and object of the law, it is crucial to look at the whole scheme of the Act. It is clear that the object of the Act is to enforce and administer Islamic law as well as to provide for the constitutional and organisation of the Syariah Court. It is a common ground that the Syariah Court has jurisdiction only over persons professing the religion of Islam. Hence, the persons appearing before the Syariah Court therefore should also be subjected to its jurisdiction. The Syariah Court must be able to enforce its laws and rules on a Peguam Syarie, as for instance, when contempt or any breach of the rules is committed by any party. Surely, the Syariah Court would not be able to enforce its laws and rules against the Respondent, as she a non-Muslim. The Syariah Court has no jurisdiction against her.

[49] Dengan alasan-alasan di atas permohonan notis usul pemohon (lampiran 1) adalah ditolak.

Permohonan pemohon ditolak.

Dilaporkan oleh Dzulqarnain Ab Fatar